Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259

COMMENTS
OF
FOX, INC.

To: Before the Commission

Fox, Inc. (Fox) files the following comments in response to the Notice of Proposed Rulemaking (Notice) in the above-referenced proceeding.

INTRODUCTION

Fox, Inc. is the parent of (1) Twentieth Century Fox, a motion picture production and distribution company; (2) Twentieth Television, a producer of television programs for the network and syndication markets and a syndicator of television programs and motion pictures; (3) Fox Broadcasting Company, an emerging television network with 140 affiliated television stations nationwide; and (4) Fox Television Stations, licensee of seven VHF and UHF television stations. The programming of Fox Broadcasting Company also is distributed directly by satellite to

nearly 2 million cable subscribers on systems where no Fox affiliate is available for carriage on a local copyright-free basis.

Numerous provisions of the Cable Television Consumer Protection and Competition Act of 1992 affect the various Fox operations in a variety of ways. Fox intends to participate actively in FCC proceedings implementing the Act.

I. The Commission Should Engage in Minimal Regulation at This Juncture

Fox's strong preference for marketplace solutions over government regulation is on the record in many Commission proceedings. In this instance, where the Commission is charged with promulgating regulations pursuant to a complex new statutory scheme, we counsel a regulatory approach that restricts government intervention to the minimum extent consistent with the statute and its legislative history, for several reasons.

The first is the pace of technological product and marketing innovation in the television industry. In adopting the Cable Act, Congress sought to regulate the provision of cable service as it exists today. Rapid and fundamental changes in technology (including a vast expansion in channel capacity and a move toward a la carte pricing) are likely to alter materially the effect of whatever regulations are adopted. While the Commission must, of

course, fully implement the will of Congress, there is a real danger that regulation will be overtaken by industry change. The result would be rules that stifle innovation or channel it in unproductive ways i.e., that are either irrelevant or counter-productive.

The Notice itself recognizes a second reason to proceed with caution. Overlaying a new set of rules on an already-complicated regulatory structure is bound to create unforeseen anomalies and inconsistencies. Anticipating every such inconsistency, and attempting to write rules around it, is an approach inevitably doomed to failure and therefore a waste of resources. If the Commission pursues detailed reconciliation of existing rules, the Cable Act and imminent marketplace developments, it will find itself twisted like a pretzel. The preferable course would be to establish a simple, general regulatory scheme, while announcing a special relief program through which anomalous situations created by the new rules may be identified. Egregious or generalized situations may be addressed at a later date through rulemaking.

Finally, and perhaps most importantly, there are many instances in which the statute itself and its legislative history are relatively clear. In these instances, the Commission need not, and indeed should not, substitute its judgments or interpretations for the clear intent of the drafters.

For all of the foregoing reasons, we urge the Commission to promulgate only the minimum regulation necessary to implement the statute.

II. The Statute is Quite Clear That Contractual Arrangements Between Stations and Program Suppliers Must be Honored.

We agree wholeheartedly with the Commission's statement (Notice at ¶ 65) that the statute's admonition that "[N]othing in this section shall be construed as...affecting existing or future video programming licensing agreements between broadcast stations and video programmers"[1] "suggests that any rights created by Section 325(b)(1)(A) can be superseded by the express terms of existing or future agreements between program suppliers and broadcast stations concerning retransmission rights."[2] Indeed, it is our view that the statutory language quoted by the Commission does more than suggest that contractual agreements between program suppliers and their customers may govern whether and the extent to which retransmission consent may be granted: the statute clearly mandates this result.

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat., Sec. 325(b)(6)(1992).

[2] Notice, paragraph 65.

The language of the statute is unambiguous in this regard. Under these circumstances, resort to the legislative intent for interpretation of this provision is neither necessary nor warranted. Nevertheless, the Senate Report is quite clear that the drafters meant the words of the statute to have their plain meaning.[3]

Thus, there can be no question that program suppliers continue to have the right to limit by contract the ability of any customer, including a broadcast station, to consent to the retransmission of the supplier's product by any cable system or other multi-channel distributors. Similarly broadcasters have the right to bargain over retransmission consent in supply contracts. Such provisions, including ones restricting the territorial ambit within which, and the financial terms under which, retransmission consent may be granted, are quite common in program distribution contracts today, and there is no indication that the Congress intended to disturb this common practice in anyway.[4]

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[3] Senate Committee on Commerce, Science and Transportation, S. Report No. 92, 102d Cong., 1st Sess. (1991), at 36.

[4] The Commission is plainly correct in concluding that "in the absence of any express contractual arrangement, [the broadcaster may] grant or withhold retransmission consent without authorization from the copyright owner." Notice at ¶ 65.

Moreover, there is nothing in the statute or its legislative history suggesting that this language applies only to nonnetwork program contracts. That is, as with any other program distribution agreements, the statute clearly contemplates that, in contracts between networks and affiliates, stations may agree to conditions or limitations on their right to grant retransmission consent.

With respect, we suggest that the Notice miscasts the issue when it speaks of contracts between broadcasters and their program suppliers **superseding** rights created by Section 325(b)(1)(A). Another way to state the question is whether broadcasters are free to enter into contracts to their perceived advantage that restrict or condition their retransmission consent rights--whether these new rights are alienable. The clear answer is yes.

Section 325(b)(1)(A) merely adds to the rights of broadcasters: it gives broadcasters the right to control the retransmission of their signals by cable systems and the right to bargain over these rights with suppliers. It does not, and need not, concomitantly restrict the rights of stations to negotiate with program suppliers the kinds of contractual terms they typically negotiate in the marketplace. Indeed, this explicitly was not the intent of the drafters of the statute, and the Commission should not substitute its judgment in this regard for

that of the Congress. The respective bargaining power of the parties will determine the extent to which retransmission consent authority is granted or circumscribed in program license agreements with suppliers and with cable systems, and, in light of the clear intent of the statute, there simply is no valid reason for the government to interfere with the workings of the marketplace in this regard.[5]

III. The Commission Should Update Section 76.51 to Include All Communities in Each ADI.

The Commission is charged with the task of updating Section 76.51 as part of its implementation of the must-carry rules. For the sake of simplicity for all parties, we urge the Commission to include all markets on its updated list and to include all significant communities in each market in an omnibus fashion. This will help to conform the zone within which stations can assert must-carry status and the zone within which their carriage is permissible under the Copyright Act. Another significant effect of this approach would be to help less mature stations achieve copyright parity with older locally competitive

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[5] It should be noted that Twentieth Television has announced its intention to not seek in its current syndication agreements any portion of Retransmission Consent fees obtained by its customers, subject only to "most favored nations" protection.

stations.[6] Every community must be assigned to a market, although these designations may be slightly different from the Arbitron ADI list. The Section 76.51 list should be updated every three years, prior to the date on which stations must elect between mandatory carriage and retransmission consent. It is true that the Arbitron list itself is updated every year; notwithstanding, yearly changes in ADI designations could conflict with the must carry/retransmission consent scheme established by the statute.

We suggest that the Commission deal with egregious conflicts between must-carry and network nonduplication or syndex status via a petition for special relief procedure for now and leave conforming the geographical ambits of these rules for a future proceeding, either in General Docket No. 87-24 or a new rulemaking, when it has had more experience with the new must-carry rules. It appears that the Commission must act to update the Section 76.51 list as soon as possible, in order to implement the statute, but it need not address the related, but separate, issue of the geographical extent of its territorial exclusivity

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[6] Fox believes strongly that the licensing and pricing of different television programs is a process that should be governed by free market forces rather than government regulation. For this reason we favor a prompt phase out of all compulsory licensing. In a free market program suppliers, including networks, and stations could mutually agree upon the territorial parameters of licensing agreements without being required to jump through artificial government hoops based upon arbitrary mileage zones and audience measurement data from 1972.

rules within the same time frame. It most likely will be necessary to establish an ADI-wide ambit for all of these rules, for the sake of consistency, but this issue need not be considered in this proceeding.

CONCLUSION

In sum, we urge the Commission to follow the principle of Occam's razor and not to take on more than it explicitly is required to do as it confronts the monumental task of promulgating regulations to implement the Cable Television Consumer Protection and Competition Act of 1992. In particular, as the Notice suggests, it should be recognized that the Act by its very words leaves the provisions of program license agreements, as they affect retransmission consent, to marketplace negotiations. The interpretation of such contractual provisions, if they ever are called into question, also should be left to forums of appropriate jurisdiction--the courts--the Commission simply has enough on its plate to take on more than the Congress clearly intended it to do.

Respectfully submitted,

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